Supreme Court, U.S.
FILED

No. 01-1762 MAY 30 2001

OFFICE OF THE CLERK

In The
Supreme Court of the United States

HAROLD DAWAVENDEWA,

Petitioner,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT and THE NAVAJO NATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRADLEY H. SCHLEIER
Counsel of Record
TOD F. SCHLEIER
SCHLEIER, JELLISON & SCHLEIER, P.C.
3101 N. Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 277-0157
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

64 pgs

QUESTIONS PRESENTED

Whether tribal sovereign immunity renders Title VII of the Civil Rights Act of 1964 impotent in claims between a non-member employee and a non-member employer engaged in business on a reservation where the tribe has passed legislation mandating discriminatory employment practices?

Whether tribal officials can be sued as indispensable and necessary parties for the purpose of prospective relief in situations where tribal nations pass and enforce legislation that conflicts with federal law regarding employment and exceeds the scope of a tribe's sovereign powers?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
A. Essential Facts	2
B. Proceedings Below	3
1. District Court and *Dawavendewa I*	3
2. The District Court on Remand	4
3. Ninth Circuit Court of Appeals	5
REASONS FOR GRANTING THE PETITION	5
I. TITLE VII WILL NO LONGER HAVE LEGAL EFFECT ON NAVAJO TRIBAL LAND	6
a. There Is No Mechanism In Place Where A Private Litigant Such As Dawavendewa Can Vindicate His Rights Under Title VII	7
b. The EEOC Has No Mechanism To Enforce Title VII's Non-Discrimination Provision On Navajo Tribal Lands	8
c. The Emasculation Of *Dawavendewa I*	9
d. Conclusion	10

TABLE OF CONTENTS – Continued

Page

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH LEGAL PRECEDENT PERMITTING CLAIMS AGAINST TRIBAL OFFICIALS FOR INJUNCTIVE/EQUITABLE RELIEF 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Arizona Public Service v. Aspaas, 77 F.3d 1128 (9th Cir. 1995) 6, 11, 12, 15

Bonanno v. Thomas, 309 F.2d 320 (9th Cir. 1962) 15

Chemehuevi Indian Tribe v. California St. Bd. Of Equalization, 757 F.2d 1047 (9th Cir. 1985), *rev'd in part on other grounds*, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985) 11

Dawavendewa v. Salt River Project Agric. Improvement and Power Dist., 276 F.3d 1150 (9th Cir. 2002) 1, 12

Dawavendewa v. Salt River Project Agric. Improvement and Power Dist., 154 F.3d 1117 (9th Cir. 1998), *cert denied*, 120 S.Ct. 843 (2000) ..... *passim*

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) 10, 13, 14

EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071 (9th Cir. 2001) 8, 9

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 80 S.Ct. 543 (1963) 10

General Telephone Company of Northwest v. EEOC, 446 U.S. 318 (1980) 8

Lumber Industry Pension Fund v. Warm Springs F. Products, 939 F.2d 683 (9th Cir. 1991) 10, 13

Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245 (1981) 13

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 105 S.Ct. 2247 (1985) 11, 12, 15

TABLE OF AUTHORITIES – Continued

Page

Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304 (2001) 7, 9

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 111 S.Ct. 905 (1991).....12

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011 (1978).....13

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670 (1978).....12

Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985).....15

Strate v. A-1 Contractors, 520 U.S. 438, 117 S.Ct. 1404 (1997).....13

U.S. v. Baker, 63 F.3d 1478 (9th Cir. 1995).....13

STATUTES AND REGULATIONS AND RULES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 621 *et seq.* 9

42 U.S.C. § 2000e *et seq.* 3

42 U.S.C. § 2000e-(b)(1) 6, 9, 10

42 U.S.C. § 2000e-2(i) 1, 6, 10

42 U.S.C. § 2000e-5..... 7

15 Navajo Nation Code § 601, *et seq.* (1995) 3, 8, 14

15 Navajo Nation Code § 604(A)(1) (1995)..... 3

Rule 19, Federal Rules of Civil Procedure 14

PETITION FOR WRIT OF CERTIORARI

Petitioner Harold Dawavendewa [hereinafter "Dawavendewa"] respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-24) is reported at 276 F.3d 1150 [hereinafter "*Dawavendewa II*"]. The opinion of the district court (App., *infra*, 25-38) is unreported.

JURISDICTION

The Ninth Circuit entered its judgment and opinion on January 2, 2002. The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on March 1, 2002. (App., *infra*, 39-40). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Civil Rights Act of 1964, § 703(i), 42 U.S.C. § 2000e-2(i):

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential

> treatment is given to any individual because he is an Indian living on or near a reservation.

STATEMENT OF THE CASE

A. Essential Facts.

Dawavendewa, a member of the Hopi Nation, resides less than three miles from the Navajo Reservation. In late 1991, Dawavendewa applied for one of seven Operator Trainee Positions at the Navajo Generating Station ["NGS"]. The NGS is operated by Respondent Salt River Project ["SRP"] on the Navajo Reservation pursuant to a lease signed in 1969. Dawavendewa passed the test for the position as part of the application process. After the initial process, Dawavendewa ranked ninth out of the top twenty applicants. However, he was not interviewed for the position, nor did he receive any further consideration for the position when it was determined that he was not a member of the Navajo Nation or married to a member of the Navajo Nation.

The failure to interview Dawavendewa was based on the application of a lease provision entered into between SRP and the Navajo Nation relating to employment practices at the NGS. The lease expressly requires the Salt River Project to give employment preferences at the NGS to members of the Navajo Nation:

> Lessees agree to give preference in employment to qualified local Navajos, it being understood that "local Navajos" means members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe. . . . In the event sufficient qualified unskilled, semi-skilled and skilled local

> Navajo labor is not available, or the quality of work of available skilled or semi-skilled workmen is not acceptable to Lessees, Lessees may than employ, in order of preference, first qualified non-local Navajos, and second, non-Navajos.

Infra, 2a-3a (n.2).

The lease's employment preference requirement is similar to the requirement in the Navajo Preference in Employment Act, 15 Navajo Nation Code § 601, *et seq.* (1995) ["NPEA"], which the Navajo Nation enacted in 1985. The tribal statute requires that "all employers doing business . . . [on or near the reservation] of the Navajo Nation . . . shall . . . [g]ive preference in employment to Navajos." *Id.* at § 604(A)(1).

Dawavendewa, thereafter, filed a charge of discrimination with the Equal Employment Opportunity Commission [hereinafter "EEOC"] alleging violation of 42 U.S.C. § 2000e *et seq.* ["Title VII"]. On or about May 28, 1993, the EEOC concluded that Dawavendewa was discriminated on the basis of his national origin with regard to SRP's failure to hire.

B. Proceedings Below.

1. District Court and *Dawavendewa I*

Dawavendewa filed his Complaint against SRP on May 13, 1996 in United States District Court for the District of Arizona. Dawavendewa claimed that SRP violated Title VII as to him, as well as other non-Navajo Native Americans who applied for positions with SRP, non-Navajo Native Americans who may apply in the future with SRP, and non-Navajo Native Americans deterred

from seeking employment with SRP at the NGS. On September 19, 1996, SRP filed a Motion to Dismiss. The district court held a hearing on SRP's Motion on April 14, 1997. On April 16, 1997, the district court granted SRP's Motion. Judgment was entered in favor of SRP on that date. On April 30, 1997, Dawavendewa filed a timely Notice of Appeal to the Ninth Circuit.

The Ninth Circuit Court of Appeals reversed the district court's judgment on September 14, 1998. *See, Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 154 F.3d 1117 (9th Cir. 1998), *cert. denied*, 120 S.Ct. 843 (2000) [hereinafter *Dawavendewa I*]. On January 13, 1999, the Ninth Circuit denied a petition for rehearing and suggestion for rehearing *en banc*. On January 10, 2000, this Court denied SRP's *writ of certiorari*.

2. The District Court on Remand

On March 24, 2000, SRP filed another Motion to Dismiss. SRP claimed that Dawavendewa's Complaint should be dismissed as the Navajo Nation was a necessary and indispensable party. Due to its sovereign status, SRP claimed that the Navajo Nation could not be added as a party and that dismissal was appropriate. SRP also claimed that permitting the case to go forward would leave it with conflicting obligations under Title VII and its obligations to the Navajo Nation in the lease and by ordinance.

On August 17, 2000, the district court issued its Order dismissing Dawavendewa's case. The district court found that the Navajo Nation was a necessary and indispensable party. The court also found that the Navajo Nation could

not be joined for sovereignty reasons and that, since complete relief cannot be given to SRP for its potentially conflicting obligation, dismissal was appropriate. Judgment was entered the same date. A timely appeal was filed on September 12, 2000.

3. Ninth Circuit Court of Appeals

The Ninth Circuit affirmed. *See* App. 1-24. Specifically, the Court held that the Navajo Nation was a necessary and indispensable party as SRP could be held to multiple conflicting obligations unless the Navajo Nation was added as a party. The Court then recognized that the Navajo Nation enjoyed sovereign immunity from suit. Even though the Ninth Circuit recognized that the addition of tribal officials may be appropriate in certain circumstances where the officials violate federal law, it held that tribal officials could not be added to supplant tribal sovereign immunity.

REASONS FOR GRANTING THE PETITION

This case raised important issues with regard to the enforceability of Title VII on tribal lands throughout the country. The Ninth Circuit's decision will grant private employers the right to discriminate freely and victimized employees will have no practical redress to remedy that discrimination that violates Title VII. The decision contains significant legal errors on issues of national and exceptional importance under Title VII that will lead to significant conflicts with existing statutory and case law throughout the country. Finally, the Ninth Circuit's decision creates an irreconcilable conflict between the Ninth

Circuit decisions in *Dawavendewa I*. As both decisions were the first to address the issues regarding Title VII and its interaction with tribal sovereignty, this Court's review is critical.

Specifically, the result of The Ninth Circuit's decision will result in Title VII having **no** validity or effect on the Navajo Nation's Tribal land.[1] In light of the procedural aspect of the case, the Ninth Circuit's decision does not conform to its earlier decision in *Arizona Public Service v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995), because it failed to provide Dawavendewa the opportunity to join the appropriate tribal officials responsible for enforcing the illegal tribal preference provisions.

Based on these reasons, the petition for writ of certiorari should be granted.

I. TITLE VII WILL NO LONGER HAVE LEGAL EFFECT ON NAVAJO TRIBAL LAND

Title VII applies on Tribal lands. Specifically, the statute permits preferences to Native Americans on or near Indian Reservations. *See,* 42 U.S.C. § 2000e-2(i). The only restriction relative to Title VII applicability on Tribal land is that it does not apply to tribal governments. *See,* 42 U.S.C. § 2000e-(b)(1). However, the Ninth Circuit's decision changes the entire scope and applicability of Title VII. The practical effect of the decision is that Title VII will no longer apply on Tribal lands where discriminatory

[1] The decision will also lead to Title VII having no effect on any tribal land where a tribal nation seeks to enforce laws which are discriminatory or illegal contractual provisions on private employers doing business on tribal lands.

legislation is passed by tribal governments because there is no mechanism in place to challenge such legislation.

a. There Is No Mechanism In Place Where a Private Litigant Such As Dawavendewa Can Vindicate His Rights Under Title VII.

The Ninth Circuit's decision appears to rest on the faulty legal premise that Dawavendewa can somehow bring his Title VII discrimination suit in tribal court and could therefore vindicate his rights. This reasoning directly conflicts with this Court's decision in *Nevada v. Hicks,* 533 U.S. 353, 121 S.Ct. 2304 (2001), where the Court specifically held that tribal courts do not have jurisdiction over federal claims by holding that claims under 42 U.S.C. § 1983 cannot be adjudicated in tribal courts. In *Hicks, supra,* this Court noted that, unlike State courts, tribal courts are **not** courts of general jurisdiction and can only adjudicate federal claims when authorized under federal law. *Id.* at 2314. This Court also noted that tribes do not have the inherent powers to control the activities of non-members of the tribe, except to the extent "necessary to protect tribal self-government or to control internal relations." *Id.* at 2310 (also noting the limits of tribal control over activities of non-members).

Like other federal claims, jurisdiction under Title VII is granted only to state and federal courts. 42 U.S.C. § 2000e-5. Moreover, Title VII does not have a specific provision granting tribal courts jurisdiction of federal claims as required in *Hicks, supra.*[2] Consequently, the

---

[2] Moreover, the lease between SRP and the Navajo Nation has a dispute resolution provision that requires that disputes be resolved

(Continued on following page)

Ninth Circuit's decision leaves Dawavendewa with no personal right of action to enforce his federal rights under Title VII against a private employer who is engaged in blatant discriminatory conduct that is in violation of this Court's decision in *Dawavendewa I,* if such conduct occurs on Tribal land.

b. The EEOC Has No Mechanism To Enforce Title VII's Non-Discrimination Provision On Navajo Tribal Lands.

The Ninth Circuit's decision also relies on the notion that the Equal Employment Opportunity Commission ["EEOC"] can somehow litigate the issues surrounding the discriminatory lease provisions and the Navajo Preference in Employment Act, Nation Code tit. 15, § 601, *et seq.* (1995) ["NPEA"] pursuant to the Ninth Circuit's decision in *EEOC v. Karuk Tribe Housing Authority,* 260 F.3d 1071 (9th Cir. 2001). However, the *Karuk* decision provides further support for the proposition that the Navajo Nation, or any other tribal nation which passes a discriminatory law, can enforce such a discriminatory provision with impunity because the *Karuk* court recognized the limitations of having the tribe as a party to something as limited as enforcement of a subpoena.

The EEOC's enforcement powers apply to cases against employers. *See, General Telephone Company of Northwest v. EEOC,* 446 U.S. 318, 326 (1980). However, as noted above, Indian tribes are specifically excluded from coverage as employers under Title VII. 42 U.S.C.

---

through the Department of Interior. Clearly, the Department of Interior does not have jurisdiction over Title VII claims.

§ 2000e-(b)(1). Consequently, the EEOC has absolutely no enforcement powers against the Navajo Nation for the discriminatory lease provision or the NPEA. *See Karuk, supra* (holding that EEOC has no regulatory power over a tribe for violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*)

c. The Emasculation of *Dawavendewa I.*

In *Dawavendewa I, supra,* the Ninth Circuit specifically held that private employers operating on or near Indian Reservations who provided preferences on the basis of tribal affiliation violated Title VII. In its current decision, the Ninth Circuit has completely emasculated its earlier decision. As noted above, there is no way that an employee or the EEOC can enforce the legal effects of this Court's decision where a tribe either enters into a lease provision with an employer on reservation land that discriminates, or passes a law that requires some type of discriminatory behavior, such as a tribal preference.

The Ninth Circuit made this decision notwithstanding significant case law which has previously held the tribe's attempt to regulate the conduct of two non-members beyond the scope of the tribe's legislative authority. *See Hicks, supra* (holding that tribal government's ability to regulate non-members of tribes cannot go beyond what is necessary to protect tribal self-government or to control internal relations). The Ninth Circuit also ignored case authority holding that tribal regulation of a private non-tribal employer that was engaged in a non-governmental activities' relationship with a non-tribal member does not involve tribal sovereignty and involves a tribe exceeding its authority. *See Karuk, supra; Lumber Industry Pension*

Fund v. Warm Springs F. Products, 939 F.2d 683 (9th Cir. 1991); *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985).

Additionally, the Ninth Circuit was provided with authority that Salt River Project's [SRP] obligation was to follow federal law with regard to its treatment of employees since Title VII was a general act of Congress. *See, Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 120, 80 S.Ct. 543 (1963). Moreover the applicability of Title VII to the Navajo Nations' land is even more clear, since the applicability of the statute on Tribal lands and for tribal government is specifically discussed. *See,* 42 U.S.C. § 2000e-(b)(1), -2(i). *See Karuk, supra.*

Consequently, the Ninth Circuit's decision ignores legal precedent that restricts the tribe's authority to regulate the conduct of non-tribal members and has left the Ninth Circuit with law that essentially nullifies and emasculates its decision in *Dawavendewa I* and renders Title VII impotent with regard to its applicability on tribal lands.

d. Conclusion.

Granting the writ of certiorari is critical due to the implications that the present action will have throughout the nation. As noted above, Title VII's purpose to eradicate discrimination in the workplace will have a new exception: it will not apply to a private workplace on tribal lands where discriminatory and illegal preference statutes are in place. Such a result does not serve the purpose of Title VII and immediate action should be taken.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH LEGAL PRECEDENT PERMITTING CLAIMS AGAINST TRIBAL OFFICIALS FOR INJUNCTIVE/EQUITABLE RELIEF.

In the Ninth Cirucit, Dawavendewa argued that the issues with regard to the necessity and indispensability of the Navajo Nation as a party could be rectified by the addition of various tribal officials that could protect whatever interest the tribal nation has in the present litigation. Dawavendewa relied specifically on the Ninth Circuit's earlier decision in *Aspaas, supra,* to support his position that tribal officials clothed with the authority to enforce the NPEA or lease provision were appropriate parties that could be added for the purpose of prospective relief. In holding that the tribal officials were appropriate parties, the Ninth Circuit relying on the Court's authority in *National Farmer Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2247 (1985) held in *Aspaas*:

> As a final jurisdictional contention, [the tribal officials] argue that they enjoy sovereign immunity from suit. *See Chemehuevi Indian Tribe v. California St. Bd. Of Equalization,* 757 F.2d 1047, 1051 (9th Cir.), *rev'd in part on other grounds,* 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985) (noting that question of tribal sovereign immunity is jurisdictional in nature). Indian tribes may not be sued absent an express and unequivocal waiver of immunity by the Tribe or abrogation of tribal immunity by Congress. (cite omitted) Tribal sovereign immunity, however, does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. (cite omitted) Here, APS has alleged that certain Navajo officials violated federal law by acting beyond the scope of their authority. *See*

> *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 105 S.Ct. 2247, 2248 (1985) (noting that in all cases before the Supreme Court involving questions as to the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians, "the governing rule of decision has been provided by federal law"). That is essentially all that this case involves at the present stage. Injunctive relief is sought; damages are not.

Aspaas, supra at 1032.

Dawavendewa as well as the *Aspaas* Court recognized that questions involving whether a tribe has exceeded the lawful limits of its authority were questions of federal law ripe for decision in the federal courts. *See National Farmers, supra* 851-853. Even though the Ninth Circuit recognized the fact that tribal officials can be appropriate parties where their actions violate federal laws, the *Dawavendewa II* Court attempted to minimize the attempt to add the officials as some "13th hour" attempt by Dawavendewa to rescue his case. *See, Dawavendewa II* App. at 1-24. The Ninth Circuit's reasoning defies the law and logic in light of the procedural posture of the case.

As a general rule, Indian tribes have been recognized as possessing common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670 (1978); *see, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 111 S.Ct. 905 (1991). However, tribal sovereignty is subject to Congress' plenary control, and thus "Congress [is] always . . . at liberty to dispense tribal immunity or to limit it." *Oklahoma,* 111 S.Ct. at 910. Absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non-members exists only in very

limited circumstances. *See Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 1409 (1997); *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981). Generally, tribes lack the "right of self governing every person within their limits except themselves." *See Montana, supra,* citing *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 209, 98 S.Ct. 1011, 1021 (1978). The inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. *Id.* at 565, 101 S.Ct. at 1258. As noted by *Montana*, tribal power is very limited:

> In addition to the power to punish tribal offenders, Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation.

Id. at 564, 101 S.Ct. 1257-58 (citation omitted); *see also, Strate, supra* (noting the limitations regarding the power of tribes to only punish tribal offenders, determine tribal membership, regulate domestic relations among members, and prescribe rules for inheritance for members). Moreover, federal law does not give way to a tribal ordinance unless the federal law encroaches on exclusive rights of self-governance, abrogates treaty rights or was intended by Congress not to apply to Indians. *U.S. v. Baker*, 63 F.3d 1478 (9th Cir. 1995); *Donovan v. Coeur d'Alene,* 751 F.2d 1113 (9th Cir. 1985). In the area of employment law, federal law regularly is involved in areas governing the employment relationship in tribal territories. *See, Lumber Industry Pension Fund v. Warm Springs F. Products*, 939

F.2d 683 (9th Cir. 1991) (applying provisions of ERISA to tribal lumber mill); *Coeur d'Alene, supra* at 1115-1116 (applying OSHA standards to a tribal farm). Finally, sovereign immunity does not apply in situations where prospective relief is sought through tribal officials. *See, Aspaas, supra*.

As demonstrated herein, the Navajo Nation's lease provision and its NPEA do not involve issues of sovereign immunity because they attempt to legislate conduct of non-members of the tribe and does not override the requirements of Title VII. Moreover, the present action deals with prospective relief relative to the continuing practice of giving preferences to non-Navajo Native Americans[3] and, therefore, does not involve or encroach on the powers of the Navajo Nation.

This is a Title VII failure to hire case between a private individual and against his potential private employer. Neither party is a member of the Navajo Nation. Additionally, the contention that the Navajo Nation would be an indispensable party to the present case occurred where SRP was permitted to file a **second** motion to dismiss after the reversal in *Dawavendewa I*.[4] For the first time, Dawavendewa was then confronted with the notion that the Navajo Nation and/or Navajo officials were acting beyond the scope of their authority and violating federal

---

[3] Dawavendewa and class members are also seeking monetary damages against SRP.

[4] The Ninth Circuit's decision implies that Dawavendewa should have added the tribal officials in his initial Complaint as evidence that they are not an appropriate party. However, that logic fails to take into account the whole purpose of Rule 19, F.R.C.P.

law in enforcing their lease provision and the NPEA with regard to the conduct of two non-members of the tribe.

Because the Ninth Circuit acknowledged that tribal officials could be held responsible in certain circumstances, SRP and/or Dawavendewa should have been permitted or given the opportunity to craft pleadings or amend pleadings that would permit the legal inclusion of those parties.[5] *See, Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1506 (9th Cir. 1985); *Bonanno v. Thomas*, 309 F.2d 320 (9th Cir. 1962). The Ninth Circuit's decision does not permit such an amendment, notwithstanding its own acknowledgement and the holding in *Aspaas*, that such action would be appropriate. Consequently, this court should also consider the Ninth Circuit's failure to follow its own holding in *Aspaas* and this Court's decision in *National Farmers, supra* in allowing the parties to proceed with tribal officials as appropriate parties.

CONCLUSION

Based on the above, the Court should accept the writ of certiorari in light of the errors in the Ninth Circuit's decision which will effectively emasculate the anti-discriminatory provisions of Title VII on Tribal lands and lead to significant conflicts with existing statutory and

[5] The Ninth Circuit states that Dawavendewa's suit would, in reality, be a suit against the Navajo Nation. Such an argument ignores the nature of such a claim – the claim would be against officials for requiring SRP, a non-member, to violate federal law, *i.e.* Title VII and the control of non-members' conduct. That is the same issue presented in *Aspaas* and should have been recognized and applied by the Ninth Circuit.

case law throughout the country and within the circuit. Moreover, permitting tribal nations to control the conduct of non-members on their land also violates the limit of their sovereign powers.

Respectfully submitted,

BRADLEY H. SCHLEIER
Counsel of Record
TOD F. SCHLEIER
SCHLEIER, JELLISON & SCHLEIER, P.C.
3101 N. Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 277-0157
Attorneys for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAROLD DAWAVENDEWA,
a single man,
Plaintiff-Appellant,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Arizona corporation,
Defendant-Appellee,

THE NAVAJO NATION,
Appellee.

No. 00-16787
D.C. No.
CV-96-01165-SMM
OPINION

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, Chief District Judge, Presiding

Argued and Submitted
October 17, 2001 – San Francisco, California

Filed January 2, 2002

Before: Robert R. Beezer, Stephen S. Trott, and
Richard C. Tallman, Circuit Judges

Opinion by Judge Trott

COUNSEL

Bradley H. Schleier, Schleier, Jellision & Schleier, P.C., Phoenix, Arizona, for the plaintiff-appellant.

John J. Egbert, Jennings, Strouss & Salmon, P.L.C., Phoenix, Arizona, for the defendant-appellee.

OPINION

TROTT, Circuit Judge:

OVERVIEW

Harold Dawavendewa ("Dawavendewa") sued the Salt River Project Agricultural Improvement and Power District ("SRP") for employing a hiring preference policy in violation of Title VII of the Civil Rights Act of 1964.[1] In particular, he alleged that SRP's lease with the Navajo Nation ("Nation") required it to preferentially hire Navajos at the Navajo Generating Station ("NGS"). The district court dismissed Dawavendewa's complaint for failure to join the Nation as an indispensable party.

Pursuant to 28 U.S.C. § 1291, we have jurisdiction over Dawavendewa's timely appeal. As a signatory to the lease, we conclude the Nation is a necessary party that

---

[1] In pertinent part 42 U.S.C. § 2000e-2 reads:

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

cannot be joined because it enjoys tribal sovereign immunity. We further conclude that tribal officials cannot be joined to replace the immune Nation; rather, the Nation itself is indispensable to this suit. Accordingly, we affirm the district court's dismissal of Dawavendewa's complaint without prejudice.

BACKGROUND

SRP operates NGS on reservation lands leased directly from the Navajo Nation. As required by its lease, SRP extends employment preferences to qualified local Navajos at NGS.[2] This lease provision mirrors the Navajo Preference in Employment Act ("NPEA") which states: "[a]ll employers doing business . . . [on or near the reservation] of the Navajo Nation . . . shall . . . [g]ive preference in employment to Navajos." Nation Code tit. 15, § 604 (1995). "Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of

---

[2] The lease provision at issue reads as follows:

> Lessees agree to give preference in employment to qualified local Navajos, it being understood that "local Navajos" means members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe. All unskilled labor shall be employed from "local Navajos," if available, providing that applicants for employment as unskilled laborers meet the general employment qualifications established by Lessees. Qualified semi-skilled and skilled labor shall be recruited and employed from among "local Navajos." In the event sufficient qualified unskilled, semi-skilled and skilled local Navajo labor is not available, or the quality of work of available skilled or semi-skilled workmen is not acceptable to Lessees, Lessees may then employ, in order of preference, first, qualified non-local Navajos, and second, non-Navajos.

employing Navajos in all job classifications including supervisory and management positions." *Id.*

Dawavendewa, a member of the Hopi Tribe, lives less than three miles from the Navajo reservation. Dawavendewa applied for employment as an Operator Trainee at NGS. After a qualifications test, Dawavendewa ranked ninth out of twenty applicants. Yet, because Dawavendewa is not affiliated with the Nation, he was never interviewed for the Operator Trainee position.

Dawavendewa filed a complaint in district court accusing SRP of discriminating against him on the basis of his national origin in violation of Title VII. Dawavendewa's complaint asserted no causes of action against the Nation or tribal officials, and they are not parties to this litigation. SRP moved to dismiss Dawavendewa's complaint on the grounds that a hiring preference policy based on tribal affiliation does not constitute national origin discrimination or, in the alternative, that Title VII's Indian preference exemption[3] expressly shelters tribal hiring policies from liability. The district court granted SRP's motion to dismiss, holding that the Indian preferences exemption excludes from liability hiring preference policies based on tribal affiliation.

---

[3] The Indian Preferences exemption codified at 42 U.S.C. § 2000e-2(i) states:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

On appeal, we reversed and remanded. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998) (*Dawavendewa I*). We concluded that (1) as described in the complaint, differential employment treatment based on tribal affiliation is actionable as national origin discrimination under Title VII; and (2) the Indian preferences exemption in Title VII does not shelter this conduct. *Id.* at 1124.

SRP appealed our decision in *Dawavendewa* I to the Supreme Court. The Solicitor General submitted an amicus brief arguing against the grant of certiorari because "this case is in an interlocutory posture, and [SRP] would not be barred from presenting other arguments in defense of its preference [policy] on remand." Indeed, no court had yet considered Dawavendewa's suit on the merits or whether any legal justification, such as treaty rights or the federal policy encouraging tribal self governance excused SRP's Navajo preference policy. The Supreme Court denied certiorari. *See Salt River Project Agric. Improvement & Power Dist. v. Dawavendewa*, 528 U.S. 1098 (2000).

On remand to the district court, SRP moved to dismiss Dawavendewa's complaint for failure to join the Nation as an indispensable party. The district court ruled that the Nation was an indispensable party and granted SRP's motion.

Dawavendewa appeals that determination.

STANDARD OF REVIEW

We review a district court's decision to dismiss for failure to join an indispensable party for abuse of discretion. *See Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996). "To the extent that the district court's determination whether a party's interest is impaired involves a question of law, we review de novo." *Pit River Home & Agric. Coop. Assoc. v. United States*, 30 F.3d 1088, 1098 (9th Cir. 1994).

DISCUSSION

Application of Federal Rule of Civil Procedure 19 determines whether a party is indispensable. The inquiry is a practical, fact-specific one, designed to avoid the harsh results of rigid application. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). We must determine: (1) whether an absent party is necessary to the action; and then, (2) if the party is necessary, but cannot be joined, whether the party is indispensable such that in "equity and good conscience" the suit should be dismissed. *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (quoting *Makah Indian Tribe*, 910 F.2d at 558).

I. Necessary Party

In determining whether the Nation is necessary under Rule 19,[4] we consider whether, in the absence of the

---

[4] Federal Rule of Civil Procedure 19(a) reads:

Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not

(Continued on following page)

Nation, complete relief can be accorded to Dawavendewa. *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). In the alternative, we consider whether the Nation claims a legally protected interest[5] in the subject of the suit such that a decision in its absence will (1) impair or impede its ability to protect that interest; or (2) expose SRP and Dawavendewa to the risk of multiple or inconsistent obligations by reason of that interest. *See* Fed.R.Civ.P. 19(a)(2); *Makah Indian Tribe*, 910 F.2d at 558. If the Nation satisfies either of these alternative tests, it is necessary to the instant litigation. *See Clinton*, 180 F.3d at 1088.

---

deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

[5] A claimed interest must be more than speculation about future events. *See McLaughlin v. Int'l Ass'n of Machinists & Aerospace Workers*, 847 F.2d 620, 621 (9th Cir. 1988). Nevertheless, an absent party need merely "*claim*" a legally protected interest in the suit because "[j]ust adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party." *Shermoen*, 982 F.2d at 1317.

A. In the Absence of the Navajo Nation, Complete Relief Cannot Be Accorded To Dawavendewa

Even if ultimately victorious in federal court, Dawavendewa cannot be accorded complete relief in the absence of the Nation. Dawavendewa seeks injunctive relief to ensure his employment at SRP and to prevent SRP from employing the Navajo hiring preference policy required by its lease with the Nation. Yet only SRP and Dawavendewa – and not the Nation – would be bound by such an injunction. The Nation could still attempt to enforce the lease provision in tribal court and ultimately, even attempt to terminate SRP's rights on the reservation. The district court correctly observed that "if SRP were to ignore [the] injunction, [Dawavendewa] and others like him would not receive the employment they seek," whereas "[i]f SRP were to comply with the injunction, the Navajo Nation would be likely to take action against SRP under its lease."

We faced a similar situation in *Confederated Tribes* where we addressed an action brought by various Indian Tribes against federal officials challenging the United States' continued recognition of the Quinault Indian Nation as the sole governing authority of the Quinault Indian Reservation. 928 F.2d at 1497. In affirming the district court's dismissal of the case for failure to join the Quinault Nation as an indispensable party, we held that "success by the plaintiffs . . . would not afford complete relief to them" because "[j]udgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation." *Id.* at 1498.

Likewise, in *Pit River Home*, plaintiff Association sought judicial review of the Secretary of Interior's designation of the Pit River Tribal Council as the beneficiary of reservation property. 30 F.3d at 1092. We affirmed the district court's dismissal of the suit for the Association's failure to join the Council as an indispensable party. In doing so, we opined that "even if the Association obtained its requested relief . . . it would not have complete relief, since judgment against the government would not bind the Council, which could continue to assert its right to [ ] the [property]." *Id.* at 1099.

Dawavendewa stands in the same position as the plaintiff Association in *Pit River Home* and the various Indian Tribes in *Confederated Tribes*: he is not assured complete relief even if victorious. Indeed, if the federal court granted Dawavendewa's requested injunctive relief, SRP would be between the proverbial rock and a hard place – comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it. If, in resolving this quandary, SRP declines to abide by the injunction and instead continues to comply with its lease obligations, Dawavendewa would not be accorded complete relief. Thus, under Rule 19(a)(1), the Nation is a necessary party.

B. Impairment of the Nation's Legally Protected Interest

The Nation is also a necessary party to Dawavendewa's action against SRP under the second prong of Rule 19(a). Under Rule 19(a)(2), an absent party is necessary if it claims "an interest relating to the subject of the action," and disposition of the action in its absence

may "as a practical matter impair or impede [its] ability to protect that interest." Fed. R. Civ. P. 19(a)(2)(i).

Here, the Nation claims a legally protected interest in its contract rights with SRP. In *Lomayaktewa v. Hathaway* we observed that, "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." 520 F.2d 1324, 1325 (9th Cir. 1975). Accordingly, we held unequivocally that the Hopi Tribe was a necessary (and indispensable) party to a suit by an individual challenging a lease between the Hopi Tribe and the Peabody Coal Company simply by virtue of being a signatory to the lease. *See Id.* at 1326.

Since *Lomayaktewa* we have reiterated this fundamental principle on numerous occasions. In *Kescoli*, for example, a member of the Navajo Nation challenged an agreement among a coal company, the United States Department of Interior Office of Surface Mining, the Navajo Nation, and the Hopi Tribe. 101 F.3d at 1307. She claimed that one lease provision permitted mining too close to Navajo burial sites in violation of federal law, 30 U.S.C. § 1272(e)(5). *See Id.* at 1308. We determined that, because a judgment invalidating the challenged provision could cause the entire tapestry of the agreement to unravel, the Hopi Tribe had a legally protected interest in the lease term. *Id.* at 1310; *see also McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989) ("Because the Tribe is a party to the lease agreement sought to be enforced, it is an indispensable party under [Rule] 19.").

Quite similar to the suits in *Lomayaktewa* and *Kescoli*, the instant litigation threatens to impair the

Nation's contractual interests, and thus, its fundamental economic relationship with SRP. The Nation strenuously emphasizes the importance of the hiring preference policy to its economic well-being. In fact, the Nation asserts that "[without the hiring preference provision], the Navajo Nation leadership would never have approved this lease agreement."

Thus, today we reaffirm the fundamental principle outlined in Lomayaktewa: a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract.[6] Here, in consideration for "Navajo water and Navajo coal," the Nation bargained for the lease provision requiring SRP to maintain a Navajo hiring preference policy. Because Dawavendewa challenges the Nation's ability to secure employment opportunities and income for the reservation – its fundamental consideration for the lease with SRP – the Nation, like the Hopi Tribe in *Kescoli*, claims a cognizable economic interest in the subject of this litigation which may be grievously impaired by a decision rendered in its absence.

In addition, a judgment rendered in the Nation's absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation. In *Kescoli*, we determined that, by virtue of its sovereign capacity, the Hopi Tribe claimed an interest in determining the appropriate balance between alternative lease terms. 101 F.3d at 1309-10. Similarly, the Nation has

---

[6] We recognize our adoption of *Lomayaktewa's* rule requires only that we progress to the analysis of the Nation's sovereign immunity. Nevertheless, we complete the inquiry directed by Rule 19 as alternative grounds, reinforcing the same conclusion.

an interest in determining the appropriate balance between alternative lease terms. Nation Amicus Br. at 7 ("[The lease] has cost Navajo water, Navajo coal, Navajo prime land, and the inevitable pollution of the Navajo homeland. It is a bargained for price that the Navajo Nation alone paid in return for jobs for the Navajo people.").

Undermining the Nation's ability to negotiate contracts also undermines the Nation's ability to govern the reservation effectively and efficiently. *See Pit River Home*, 30 F.3d at 1101 (finding impairment of the Council's legally protected interest in governing the Tribe); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (finding impairment of a legally protected interest where outcome would jeopardize the authority of the Quinaults to govern the reservation); *Confederated Tribes*, 928 F.2d at 1498 (finding impairment where plaintiffs sought a complete rejection of the Quinault Nation's ability to govern the reservation). Thus, as a result of its multiple economic and sovereign interests, the Nation sufficiently asserts claims relating to this litigation which may be impaired in its absence. Under Rule 19(a)(2)(i) the Nation is, therefore, a necessary party.

C. The Substantial Risk of Inconsistent or Multiple Obligations by Virtue of the Nation's Legally Protected Interests

Any disposition in the Nation's absence threatens to leave SRP subject to substantial risk of incurring multiple

or inconsistent obligations.[7] As explained above, although an injunction may compel SRP to stop its hiring preference policy and to hire Dawavendewa, an injunction would not bind the Nation, which could continue to enforce the hiring preference policy required by the lease. This scenario leaves SRP facing intractable, mutually exclusive alternatives and thus, subjects SRP to the substantial risk of facing multiple, inconsistent obligations. Thus, we determine that the Nation is also a necessary party under Rule 19(a)(2)(ii).

Dawavendewa contends that SRP does not face this quandary because the Ninth Circuit held in *Dawavendewa I* that SRP's conduct violated Title VII. In fact, Dawavendewa asserts that the district court's sole task on remand is to determine class certification and class relief. On this score, Dawavendewa misapprehends the reach of our prior decision. In *Dawavendewa I*, we held only that a hiring preference policy based on tribal affiliation, as described in the complaint, stated a claim upon which relief could be granted. 154 F.3d at 1124. As pointed out by the Solicitor General's amicus brief, however, we did not address the merits of the Nation's proffered legal justifications in defense of the challenged hiring preference policy. In particular, we declined to consider whether the Nation's 1868 Navajo Treaty, the federal policy fostering tribal self-governance, the NPEA, or any other legal defense justified SRP's hiring preference policy.

---

[7] Dawavendewa suggests that inconsistent obligations arise only if the Nation "violates the federal law" by not abiding by our decision in *Dawavendewa I*. Yet *Dawavendewa I* did not decide this case on the merits, and in fact, the Nation has already indicated a willingness to enforce its hiring preference policy in tribal court in spite of the outcome in this litigation.

Dawavendewa contends that we need not consider these defenses because the Ninth Circuit has already considered and rejected legal defenses based on tribal self-governance and treaty rights in similar situations. Thus, Dawavendewa continues, the Nation's present assertion of these defenses is "baseless, specious, and violative of Rule 11." For support, however, Dawavendewa cites no relevant cases. Instead, he refers us to cases which merely reaffirm the general rule that statutes of general applicability apply to Native Americans on tribal land. *See, e.g., Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (applying ERISA to a lumber mill on reservation land); *Donovan v. Coeur d'Alene*, 751 F.2d 1113 (9th Cir. 1985) (applying OSHA standards to a tribal farm).

Dawavendewa neglects to explain that these cases also outline specific exceptions to the general rule – situations in which statutes of general applicability do not apply to Native Americans on tribal lands. *See Coeur d'Alene*, 751 F.2d at 1116. In appropriate situations, federal law yields out of respect for treaty rights or the federal policy fostering tribal self-governance.[8] *See Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 711-12 (10th Cir. 1982) (finding 1868 Navajo Treaty prohibited

---

[8] As expressed in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630 (1970): "The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction." As a consequence, the Supreme Court has often held that treaties with the Indians should be interpreted "liberally in favor of the Indians," such that any doubtful expressions in them should be resolved in their favor. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5 (1999); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).

application of OSHA on Navajo reservation). Dawavendewa cites no cases considering Title VII's application on tribal lands generally, or explaining why an exception does not apply in this case. He certainly points to no authority, and we find none, construing the 1868 Navajo Treaty as it pertains to Title VII. Without the aide of supporting precedent, we reject Dawavendewa's invitation to ignore the Nation's plausible legal defenses.

Accordingly, we determine that SRP does face the substantial possibility of multiple or inconsistent obligations if the Nation is not a party to this suit. Thus, we conclude that in addition to being necessary as contemplated by Rule 19(a)(1) and 19(a)(2)(i), the Nation is a necessary party as defined by Rule 19(a)(2)(ii).

II. Tribal Sovereign Immunity

Having determined that the Nation is thrice over a necessary party to the instant litigation, we next consider whether it can feasibly be joined as a party. We hold it cannot. Federally recognized Indian tribes enjoy sovereign immunity from suit, *Pit River Home*, 30 F.3d at 1100, and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

In this case, the Nation has not waived its tribal sovereign immunity and Congress has not clearly abrogated tribal sovereign immunity in Title VII cases[9]

---

[9] In fact, pursuant to 42 U.S.C. § 2000e(b), Indian tribes are specifically exempt from the requirements of Title VII. *See also, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (finding that Congress

(Continued on following page)

Dawavendewa, undaunted, argues that tribal sovereign immunity does not exist because the suit could be sustained against tribal officials. We disagree.

To support this proposition, Dawavendewa relies heavily on *Burlington N.R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), and *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1996). In *Blackfeet Tribe*, we extended the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908),[10] to tribal officials. In particular, we held that, in cases seeking merely prospective relief, sovereign immunity does not extend to tribal officials acting pursuant to an unconstitutional statute. *See Blackfeet Tribe*, 824 F.2d at 901.

---

abrogated the States' sovereign immunity by enacting Title VII under the Enforcement Clause, § 5, of the Fourteenth Amendment); *Board of Trustees v. Garrett*, 531 U.S. 356, 374 (2001) (finding ineffective Congress's abrogation of state's sovereign immunity from suit by private individuals for money damages under the ADA).

[10] *Ex Parte Young* held that a suit against a state official acting pursuant to an allegedly unconstitutional statute does not contravene that state's sovereign immunity under the Eleventh Amendment. 209 U.S. 123 (1908). Justice Peckham wrote: "The act to be enforced is alleged to be unconstitutional; and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional." *Id.* at 159.

In announcing this rule, the Court created an oft-recognized legal fiction that injunctive relief against state officials acting in their official capacity does not run against the State. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269-70, 281 (1997); Charles Alan Wright, *The Federal Courts* 311 (1994).

In *Aspaas*, the Navajo Supreme Court determined that the Arizona Public Service Company's ("APS") anti-nepotism policy violated Navajo employment discrimination law. APS then filed suit in federal district court seeking injunctive relief against the Navajo Nation, its executive agencies, Navajo Supreme Court Justices, and tribal officials challenging their authority to regulate APS's employment practices. The defendants argued that they enjoyed sovereign immunity from suit. We held that the Nation and its executive agencies were immune from suit, but reaffirming our decision in *Blackfeet Tribe*, we held that sovereign immunity did not bar prospective relief against the individual tribal officials acting beyond the scope of their authority in violation of federal law. *See Aspaas*, 77 F.3d at 1133-34.

Dawavendewa's argument strikes us as an attempted end run around tribal sovereign immunity. Neither *Blackfeet Tribe* nor *Aspaas* insinuated that a plaintiff may circumvent the barrier of sovereign immunity by merely substituting tribal officials in lieu of the Indian Tribe. Rather, the doctrine announced in *Blackfeet Tribe* and reaffirmed in *Aspaas* permitted suits against officials allegedly acting in contravention of federal law.

That doctrine is inapplicable to Dawavendewa's suit. Unlike the complaints in *Blackfeet Tribe* or *Aspaas*, Dawavendewa's complaint never mentions tribal officials. Neither does it allege that tribal officials acted in contravention of constitutional or federal statutory law, nor has it named any tribal officials as parties to this litigation. Indeed, when pressed at oral argument, Dawavendewa could not even specify which tribal officials he would join, if permitted to do so.

In *Shermoen*, we addressed a similar ploy hatched by a plaintiff attempting to circumvent tribal sovereign immunity. 982 F.2d at 1319. In that case, the plaintiffs sued the United States, challenging the constitutionality of the Hoopa-Yurok Settlement Act. *Id.* at 1314. The district court granted the United States' motion to dismiss for failure of the plaintiffs to join the Hoopa Valley and Yurok Tribes as indispensable parties. Then "in an attempt to circumvent the Hoopa Valley Tribe's sovereign immunity," relying on *Blackfeet Tribe*, plaintiffs sought to file a second amended complaint, naming individual members of the Hoopa Valley Tribe's governing council as defendants. *Id.* at 1317.

In rejecting plaintiff's attempt to prolong its suit, we reiterated the general rule: "a suit is v[ersus] the sovereign if judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Id.* at 1320 (citations and internal quotations omitted). Indeed, as taught by the Supreme Court, if the relief sought will operate against the sovereign, the suit is barred. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984).

As in *Aspaas* and *Blackfeet Tribe*, we have permitted suits against officials when it is alleged that those officials acted beyond their authority in contravention of constitutional or federal statutory law. Nevertheless, as recognized in *Shermoen*, a suit may be barred, even if the officer being sued has acted unconstitutionally or beyond his statutory powers, when the requested relief will require affirmative actions by the sovereign or disposition of unquestionably sovereign property.

Here, Dawavendewa sued only SRP for discriminating against him on the basis of his national origin. Dawavendewa alleges that SRP utilizes a Navajo hiring preference policy pursuant to a lease agreement with the Nation. His complaint specifies no action by tribal officials performed in contravention of constitutional or federal statutory law. Perhaps that fact is self-evident, demonstrated by Dawavendewa's failure to name any tribal official as a party to the original action.

Only when faced with the possible dismissal of his suit did Dawavendewa seek to join tribal officials. Unlike the ruling of the Navajo Supreme Court condemning APS's anti-nepotism policy in *Aspaas*, here no Nation official has heretofore acted to enforce the objectionable lease provision.

Undoubtedly many actions of a sovereign are performed by individuals. Yet even if Dawavendewa alleged some wrongdoing on the part of Nation officials, his real claim is against the Nation itself. At bottom, the lease at issue is between SRP and the Nation, and the relief Dawavendewa seeks would operate against the Nation as signatory to the lease. As such, we reject Dawavendewa's attempt to circumvent the Nation's sovereign immunity by joining tribal officials in its stead.

Finally, Dawavendewa recasts his complaint to allege that the Nation exceeded its sovereign jurisdiction in executing the lease and enacting the NPEA because those actions are attempts by the Nation to legislate the conduct of non-Indians within the reservation. *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981). In pressing this argument, he correctly notes that "tribal jurisdiction over the conduct of

nonmembers exists only in very limited circumstances" and that "the inherent sovereign powers of an Indian Tribe do not extend to the activities of non-members of the Tribe."

From this solid precipice, however, Dawavendewa plummets to the assertion that the Nation cannot assert tribal sovereign immunity against Dawavendewa's claims. We disagree. Indeed, with this conclusion, Dawavendewa appears to confuse the fundamental principles of tribal sovereign authority and tribal sovereign immunity. The cases Dawavendewa cites address only the extent to which a tribe may exercise jurisdiction over those who are nonmembers, i.e., tribal sovereign authority. Those cases do not address the concept at issue here – our authority and the extent of our jurisdiction over Indian Tribes, *i.e.*, tribal sovereign immunity.

In the case at hand, the only issue before us is whether the Nation enjoys sovereign immunity from suit. We hold that it does, and accordingly, it cannot be joined nor can tribal officials be joined in its stead.

III. Indispensable Party

The Nation is a necessary party that cannot be joined due to its tribal sovereign immunity. Accordingly, we consider whether the Nation is indispensable such that Dawavendewa's action must be dismissed. *See* Fed.R.Civ.P. 19(b).[11] A party is indispensable if in "equity and good

---

[11] Federal Rule of Civil Procedure 19(b) reads:

Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine

(Continued on following page)

conscience," the court should not allow the action to proceed in its absence. *Id.*; *Kescoli*, 101 F.3d at 1310. To make this determination, we must balance four factors: (1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *See Kescoli*, 101 F.3d at 1310. If no alternative forum exists, we should be "extra cautious" before dismissing the suit. *Makah*, 910 F.2d at 560.

If the necessary party enjoys sovereign immunity from suit, some courts have noted that there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as "one of those interests 'compelling by themselves,'" which requires dismissing the suit. *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 (D.C.Cir. 1986) (quoting 3A James W. Moore et al., *Moore's Federal Practice* ¶19.15 (1984)); *see also Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989). Cognizant of these out-of-circuit decisions, the Ninth Circuit has, nonetheless, consistently applied the four part balancing test to determine whether Indian

---

whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

tribes are indispensable parties. *See Confederated Tribes*, 928 F.2d at 1499.

A. Prejudice – The prejudice to the Nation stems from the same impairment of legal interests that makes the Nation a necessary party under Rule 19(a)(2)(i). *See Clinton*, 180 F.3d at 1090 (determining prejudice test under Rule 19(b) is essentially the same as the inquiry under Rule 19(a) (citing *Confederated Tribes*, 928 F.2d at 1499)). A decision rendered in this case prejudices the Nation's economic interests in the lease with SRP, namely its ability to provide employment and income for the reservation. A decision so rendered would also prejudice the Nation's sovereign interests in negotiating contractual obligations and governing the reservation.

Furthermore, the absence of the Nation prejudices SRP by preventing the resolution of its lease obligations. As explained by the district court, "SRP could be faced with an irreconcilable conflict between SRP's obligations to [Dawavendewa] and others similarly situated and SRP's obligations to the Navajo Nation under the lease." Dawavendewa argues that SRP and the Navajo Nation face no prejudice because their "duties and obligation have already been determined" in *Dawavendewa I*. Yet it is precisely because this case has not been determined on the merits and all legal defenses have not been presented, that SRP and the Nation face potential prejudice. This factor weighs in favor of dismissal.

B. Shaping Relief – No relief mitigates the prejudice. Any decision mollifying Dawavendewa would prejudice the Nation in its contract with SRP and its governance of the tribe. This factor weighs in favor of dismissal.

C. Adequate Relief – No partial relief is adequate. Any type of injunctive relief necessarily results in the above-described prejudice to SRP and the Nation. An award of damages would not resolve SRP's potential liability to other plaintiffs or address the Nation's contention that Title VII does not apply on the reservation.

D. Alternative Forum – Finally, we note that in *Lomayaktewa*, *Confederated Tribe*, *Shermoen*, *Pit River Home*, *Quileute Indian Tribe*, *Kescoli*, and *Clinton*, we determined that the plaintiff would be without an alternative forum to air his grievances. Nevertheless, in each case, we determined that the absent Indian Tribe was indispensable and dismissed the case.

Dawavendewa, on the other hand, may have a viable alternative forum in which to seek redress. Sovereign immunity does not apply in a suit brought by the United States. Moreover, recently, in *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001), we held that because no principle of law "differentiates a federal agency such as the EEOC from 'the United States itself,'" tribal sovereign immunity does not apply in suits brought by the EEOC.

At the eleventh hour, the EEOC moved to intervene in an effort to salvage Dawavendewa's case and possibly combine it with other pending litigation. Although we denied that motion, we note that nothing precludes Dawavendewa from refiling his suit in conjunction with the EEOC.[12]

---

[12] Moreover, Dawavendewa may follow the procedural posture suggested by *Aspaas*. 77 F.3d at 1133-34. He may bring suit in tribal

(Continued on following page)

Recognizing the resources and aggravation consumed in relitigating, however, we determine that factor four remains in equipoise. Balancing these four factors, we find the Nation is indispensable, and in "equity and good conscience," this action should not proceed in its absence.

Dawavendewa is not entitled to attorney's fees.

CONCLUSION

We affirm the district court's decision to dismiss Dawavendewa's complaint for failure to join the Nation as an indispensable party.

AFFIRMED.

---

court and after an adverse decision, Dawavendewa could allege sufficient actions by tribal officials, *i.e.*, Navajo Supreme Court Justices, to sustain his action. *See also National Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Harold Dawavendewa, a single man, Plaintiff, vs. Salt River Project Agricultural Improvement and Power District, an Arizona corporation, Defendant.	No. 96-1165-PHX-SMM **MEMORANDUM OF DECISION AND ORDER** (Filed Aug. 17, 2000)

Pending before the Court is Defendant's Motion to Dismiss for Failure to Join Indispensable Party. After considering the arguments raised by the parties in their briefing and in oral argument, the Court now issues the following ruling.

BACKGROUND

The Defendant, Salt River Project (SRP), operates the Navajo Generating Station on Navajo reservation lands leased from the Navajo Nation in Arizona. It is undisputed that Section 18 of SRP's 1969 lease with the Navajo Nation requires SRP to give employment preference first to qualified local Navajos, then to qualified non-local Navajos and finally to non-Navajos.

The Plaintiff, Harold Dawavendewa, is a member of the Hopi tribe who lives less than three miles away from the Navajo Reservation in Arizona. In 1991 he applied for one of seven Operator Trainee positions at the Salt River

generating station. His Complaint alleges he took and passed a test for the position, ranking ninth out of the top twenty applicants. However, he alleges that because he was not a member of, or married to a member of, the Navajo Nation he was never interviewed for the position.

In his Complaint, Plaintiff alleges SRP has enforced this preferential provision and in doing so has violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* SRP originally moved to dismiss the complaint on the grounds that discrimination based on tribal affiliation (as opposed to discrimination on the basis of being a Native American in general) does not constitute "national origin" discrimination under Title VII. Under that theory, SRP believed its Navajo plant was exempt from following Title VII because of Title VII's "Indian Preferences exemption" under § 703(i), 42 U.S.C. § 2000e-2(i). This Court granted the motion to dismiss, holding that tribal preference polices [sic] are exempt from Title VII.

Plaintiff appealed and the Ninth Circuit Court of Appeals concluded that "differential employment treatment based on tribal affiliation is actionable as 'national origin' discrimination under Title VII." *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998), *cert. denied,* 120 S.Ct. 843 (2000). The Ninth Circuit remanded the case to this Court where the Defendant has now brought a motion to dismiss pursuant to Rule 12(b)(7), Fed. R. Civ. P. The Navajo Nation has filed an amicus curiae brief in support of Defendant's motion.

STANDARD OF REVIEW

The Defendant has moved for dismissal under Rule 12(b)(7) for Plaintiff's failure to join the Navajo Nation as an indispensable party under Rule 19. "The [Rule 19] inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application." *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558 (9th Cir. 1990) (citations omitted). The Federal Rules of Civil Procedure establish a two-step analysis for deciding who should be joined in an action, which is set out in Rule 19(a):

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). However, "[s]peculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19." *Northrup Corp. v. McDonnell Douglas Corp.,* 705 F.2d 1030, 1046 (9th Cir.1983).

Necessary parties must be joined in the action if possible. If joinder is not possible, a court must consider

whether in equity and good conscience the lawsuit should continue without the absent party. *See* Fed. R. Civ. P. 19(b). Under Rule 19(b):

> [T]he court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience? If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable.

State of Washington v. United States, 87 F.2d 421, 428 (9th Cir. 1987). A case should not continue in the absence of an indispensable party. However, dismissal under Rules 12(b)(7) and 19 is generally disfavored. *See Gorsuch v. Fireman's Fund Ins. Co.,* 360 F.2d 23 (9th Cir. 1966).

The burden of proving that an absent party is indispensable lies with the party that has requested the dismissal. Only if the court determines that the action should be dismissed is the absent party labeled "indispensable." *See Eldredge v. Carpenters 46 Northern California Joint Apprenticeship and Training Committee,* 662 F.2d 534 (9th Cir. 1981). A dismissal for lack of an indispensable party is without prejudice to the plaintiff's right to reinstate the

claim in a court where the indispensable party can be joined. *See Dredge Corp. v. Penny,* 338 F.2d 456 (9th Cir. 1964).

DISCUSSION

Defendant moves for dismissal under Rule 12(b)(7) for Plaintiff's failure to join an indispensable party. Three primary issues stand before the court: (1) is the Navajo Nation a necessary party as defined under Rule 19; (2) if the Navajo Nation is a necessary party, can it be joined; and (3) if the Navajo Nation cannot be joined, should the action proceed among the current parties.

I. THE NAVAJO NATION IS A NECESSARY PARTY

The Navajo Nation is a necessary party under both prongs of Rule 19(a). Under 19(a)(1), the Navajo Nation is indispenable because without its involvement full relief, including an injunction, cannot be granted. Under 19(a)(2), the Navajo Nation has an interest in the outcome of this case and in protecting its rights, and without the Navajo Nation, SRP could face inconsistent obligations under federal law and under its lease and tribal law.

A. Complete Relief

Rule 19(a)(1) states that a necessary party shall be joined if in the party's absence complete relief could not be accorded to those who are already parties in the action. Here, complete relief would be impossible for the Plaintiff if the Navajo Nation is not joined. Plaintiff has requested injunctive relief. However, in the absence of the

Navajo Nation, injunctive relief could operate only against SRP. Any such injunction would force SRP to choose between complying with the injunction or complying with its lease.

If SRP were to ignore the injunction, Plaintiff and others like him would not receive the employment they seek. If SRP were to comply with the injunction, the Navajo Nation would be likely to take action against SRP under its lease, potentially terminating SRP's rights on the reservation. (*See* Mem. of Law of Navajo Nation as Amicus Curiae [hereinafter "Amicus Brief"] at 5-6 (describing lease agreement as, at heart, a "water for jobs" relationship and noting that the Navajo Nation "found it necessary to bargain our water, our land and our environment for those jobs")). Again, such action would prevent Plaintiff and others like him from obtaining employment at the SRP plant.

Plaintiff argues that SRP does not face this conflict, or at least that it cannot be made any worse by further proceedings in this action, because the Ninth Circuit has already held that SRP's actions violate Title VII. (*See* Pl.'s Resp. at 4-5.) Plaintiff, however, reads the Ninth Circuit's opinion too broadly. The Ninth Circuit held only that Plaintiff's complaint states a claim upon which relief can be granted. *See Dawavendewa,* 154 F.3d at 1120. The Circuit did not find a violation of Title VII, and did not consider any defenses based on the facts or on the rights of the Navajo Nation under federal or tribal law or treaties.

B. Claimed Interest

The Navajo Nation is also a necessary party under Rule 19(a)(2). Under 19(a)(2)(i), "the finding that a party is

necessary to the action is predicated only on that party having a *claim* to an interest. . . . " *Shermoen v. U.S.*, 982 F.2d 1312, 1317 (9th Cir. 1992) (emphasis in original). The Navajo Nation clearly claims an interest since this case could decide definitively how Title VII applies to Indian tribes and how the Navajo Preference in Employment Act relates to Title VII and the contract with SRP. Absence from this litigation will "impair or impede" the Navajo Nation from "mak[ing] known their interests and legal theories." *Wichita and Affiliated Tribes of Oklahoma v. Hodel,* 788 F.2d 765, 775 (D.C.Cir.1986). In this case, the Navajo Nation's interest is in preserving its sovereign immunity and its job preferences, with its concomitant "right not to have [its] legal duties judicially determined without consent." *Enterprise Mgt. Consultants v. U.S. ex rel. Hodel,* 883 F.2d 890, 894 (10th Cir.1989). In the words of the Navajo Nation, "If this, or any, Court is looking to strip us of those job preferences, certainly our participation in any such judicial review is indispensable." (Amicus Brief at 6.)

C. Inconsistent Obligations

Under Rule 19(a)(2)(ii), a party is also necessary if the party's absence will lead to inconsistent obligations for a party already involved in the litigation. As discussed in section I.A. above, this litigation threatens SRP with an obligation under Title VII to give equal consideration to all Native Americans, and a conflicting obligation under its lease with the Navajo Nation to give preference to Navajos. SRP's obligations under the lease cannot be resolved in the absence of the Navajo Nation. The Court therefore concludes that the Navajo Nation is a necessary party in this litigation.

II. THE NAVAJO NATION CANNOT BE JOINED

The Navajo Nation, in this circumstance, enjoys sovereign immunity and thus cannot be joined as a necessary party before this Court. Indian tribes are sovereign entities that have "common-law immunity from suit traditionally enjoyed by sovereign powers." *Imperial Granite Co. v. Pala Band of Mission Indians,* 940 F.2d 1269, 1271 (9th Cir. 1991) (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978)). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Testan* 424 U.S. 392, 399 (1976) (quoting *United States v. King* 395 U.S. 1, 4 (1969)).

Tribal sovereign immunity includes exemption from suit without Congressional authorization. Thus, a tribe cannot be joined in litigation involuntarily. *See Kiowa Tribe v. Manufacturing Techs., Inc.,* 523 U.S. 751 (1998); *United States v. United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940). The potential for prejudice to people or entities that do business with a tribe does not affect the existence and application of tribal immunity. *See Kiowa,* 423 U.S. at 758.

Plaintiff's arguments against the application of tribal immunity in this case are not persuasive. Plaintiff attempts to rely on *Strate v. A-1 Contractors,* 520 U.S. 438 (1997), and *Montana v. United States,* 450 U.S. 544 (1981). These cases address the extent to which tribal courts or agencies have jurisdiction over non-Indians within their reservations, not the extent to which non-tribal courts have jurisdiction over tribes. *See Strate,* 520 U.S. at 445-446; *Montana,* 450 U.S. at 565.

Plaintiff also relies on *Arizona Public Service Co. v. Aspaas,* 77 F.3d 1128 (9th Cir. 1996), to argue that the

Navajo Nation is not immune from suit in this case. However, the holding in *Aspaas* addresses only the immunity of tribal officials, and not the sovereign tribe. *See Aspaas,* 77 F.3d at 1134. Here, however, SRP's lease is with the Navajo Nation itself, not with any particular officials.

Finally, Plaintiff argues that sovereign immunity does not apply in situations involving only prospective relief. Sovereign immunity, however, is not determined by the relief sought. *See Burlington N. R.R. v. Blackfeet Tribe,* 924 F.2d 899, 901 n.3 (9th Cir. 1991) (dismissing tribe from suit that sought declaratory and injunctive relief); *Hardin v. White Mountain Apache Tribe,* 779 F.2d 476 (9th Cir. 1985) (barring suit asking for injunctive and declaratory relief and damages). The Court therefore concludes that the Navajo Nation cannot be joined in this lawsuit.

III. THE NAVAJO NATION IS AN INDISPENSABLE PARTY

Because the Court has determined that the Navajo Nation is a necessary party but cannot be properly joined, the Court must undertake the four-step analysis of Rule 19(b) to determine if the Navajo Nation is indispenable to this litigation. *See Pit River Home and Agric. Coop. Ass'n. v. United States,* 30 F.3d 1088, 1099 (9th Cir. 1994). Under Rule 19(b), a court must consider:

> First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third,

> whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b); *see also Makah,* 910 F.2d at 558.

Turning to the first factor, any judgment rendered in the absence of the Navajo Nation could prejudice both SRP and the Nation. SRP could be faced with an irreconcilable conflict between SRP's obligations to Plaintiff and others similarly situated and SRP's obligations to the Navajo Nation under the lease. The Navajo Nation would also be prejudiced by being unable to defend its employment preferences and sovereign rights. The NAVAJO Nation believes that it has treaty rights that override the requirements of Title VII. (*See* Amicus Brief at 4-5.) Those treaty rights could be compromised by a judgment for Plaintiff. In addition, the Navajo Nation has fundamental economic interests in its relationship with SRP. (*See* Amicus Brief at 2, 4 (identifying employment preference as "explicit" consideration for and "one of, if not the, most critical aspects" of the lease).) A judgment in this case could alter SRP's relationship with the Navajo Nation, thereby prejudicing the Nation's interests.

The second factor in the indispensable party analysis requires consideration of whether the prejudice can be relieved or minimized by shaping relief. *See Kescoli v. Babbitt,* 101 F.3d 1304, 1311 (9th Cir. 1996). Here, Plaintiff requests injunctive relief. Any injunction compelling SRP to hire Plaintiff or others like him would necessarily create the prejudice discussed above. Even were the Court to decline to issue injunctive relief, SRP would still be faced with a choice between potential liability to a large and continually growing class of plaintiffs or breaching the

lease. In either event, the threat of prejudice to both SRP and the Navajo Nation is severe.

Under the third factor, the Court must consider the adequacy of any judgment that could be rendered in the absence of the necessary party. "[I]f an adequate judgment cannot be reached without the absent party, then the court weighs this in favor of finding the absent party indispensable." *Village of Hotyela Traditional Elders v. Indian Health Services,* 1 F. Supp. 2d 1022, 1030 (D. Ariz. 1997).

Here, the Court cannot issue an adequate judgment in the absence of the Navajo Nation. While the Court could enter a judgment in favor of Plaintiff for damages only, such a judgment would not provide Plaintiff with employment, would not resolve SRP's obligations to other potential plaintiffs, and would ignore the Navajo Nation's arguments against the application of Title VII on the reservation. Any judgment that includes injunctive relief, while fully adequate from Plaintiff's perspective, would still create inconsistent obligations for SRP without addressing the potential rights of the Navajo Nation to control employment on its land. The court therefore concludes that it could not render an adequate judgment in the absence of the Navajo Nation, because it could not resolve the rights of SRP and the Nation under the lease or the rights of the Navajo Nation within its sovereign territory.

The fourth factor relates to the adequacy of any other potential remedies available to Plaintiff. In this case, Plaintiff might be able to challenge SRP's actions in Navajo Tribal Court. Neither of the parties have presented any evidence to indicagte what remedies would be available to Plaintiff, if any, or whether they would be

adequate. Even assuming Plaintiff would have no other remedy, the Navajo Nation could still be treated as indispensable. Although unfortunate, the potential for unfairness to plaintiffs is a necessary attribute of tribal sovereign immunity. *See Kiowa,* 523 U.S. at 758; *see also Shermoen,* 982 F.2d at 1320 ("We realize that our decision effectively denies appellants a forum in which to have some of their grievances heard.").

Dismissal for lack of an indispensable party may be avoided if an existing party can adequately represent the interests of the absent party. *See Makah* 910 F.2d at 558. To determine if one party can represent another, the Court must consider:

> whether 'the interests of a present party to the suit are such that it will undoubtedly make all' of the absent party's arguments; whether the party is 'capable of and willing to make such arguments'; and whether the absent party would 'offer any necessary element to the proceedings' that the present parties would neglect.

Shermoen, 982 F.2d at 1318 (quoting *County of Fresno v. Andrus*, [sic] F.2d 436, 439 (9th Cir. 1980)).

Here, the Court cannot say that SRP will undoubtedly make or is capable of and willing to make all of the arguments the Navajo Nation would raise. SRP is concerned with avoiding liability and preserving an advantageous relationship with the Navajo Nation. The Navajo Nation is concerned with preserving an advantageous relationship with SRP, but also with protecting its rights as a sovereign power and clarifying its authority under federal law. While these interests overlap, they are not identical. Indeed, SRP has already begun to identify differences. (*See*

Def. SRP's Resp. to Mem. of Law of Navajo Nation at 2 n.1 ("SRP does not necessarily agree with all of the Navajo Nation's characterizations of the lease and all the legal positions asserted in the Navajo Nation's Memorandum.").)

In addition, the Navajo Nation's principal arguments against the application of Title VII on the reservation arise form the Nation's 1868 treaty with the United States. (*See* Amicus Brief at 4-5.) The Navajo Nation has a unique interest and expertise in its treaty rights that would be necessary to fully adjudicating the rights of all the parties and that cannot be duplicated by SRP. The Court concludes that SRP cannot adequately represent the interests of the Navajo Nation in this matter.

CONCLUSION

The Ninth Circuit has found that title VII's Indian Preference Exemption does not allow discrimination on the basis of tribal origin. That holding leaves SRP and this Court with an inevitable conflict between federal law and tribal power. While courts must grapple with these difficult issues, ultimately it is Congress that must clarify the discrepancies between federal law and sovereign authority. Without such clarification, delicate issues are left to be decided by the United States Supreme Court only after a long journey through a patchwork of lower court decisions. This prolonged path does not do justice to litigants, to the federal judicial system, or to the judicial systems of sovereign nations.

In the interim, the Court must apply the law as it stands today. With some reluctance, the Court concludes that this matter must be dismissed. In the absence of the

Navajo Nation, the Court cannot provide either complete or adequate relief, cannot protect SRP from the threat of conflicting obligations, and cannot account for the Navajo Nation's sovereign rights. Although this may leave Plaintiff without a remedy, the prejudice to Plaintiff is a necessary cost of the Navajo Nation's sovereign status. Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss [Doc. No. 32] is granted and this case is dismissed without prejudice to Plaintiff's rights to pursue his claims in another forum.

DATED this 16 day of August, 2000.

/s/ Stephen M. McNamee
Stephen M. McNamee
Chief United States
District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD DAWAVENDEWA, a single man, Plaintiff-Appellant, v. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Arizona corporation, Defendant-Appellee, THE NAVAJO NATION, Appellee.	No. 00-16787 D.C. No. CV-96-01165-SMM ORDER (Filed Mar. 1, 2002)

Before: BEEZER, TROTT, and TALLMAN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Trott and Tallman have voted to deny the petition for rehearing en banc, and Judge Beezer so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

(2)

No. 01-1762

Supreme Court, U.S.
FILED
JUL 2 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

HAROLD DAWAVENDEWA,

Petitioner,

vs.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JANE D. ALFANO
Corporate Counsel
ROBERT T. ANDERSON
Senior Attorney
Salt River Project
P.O. Box 52025
Phoenix, Arizona
85072-2025
(602) 236-2359

JOHN JAMES EGBERT
Counsel of Record
JENNINGS, STROUSS &
SALMON, P.L.C.
Two North Central Avenue
16th Floor
Phoenix, Arizona 85004
(602) 262-5994
Attorneys for Respondent

July 2002

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pgs

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
A. Essential Facts	1
B. Proceedings Below	2
1. District Court	2
2. Court of Appeals	4
REASONS WHY THE PETITION SHOULD BE DENIED	5
I. THE NINTH CIRCUIT'S OPINION IS FULLY CONSISTENT WITH THE DECISIONS OF THIS AND OTHER FEDERAL COURTS	5
II. THE NINTH CIRCUIT'S DECISION HAS ONLY LIMITED APPLICATION BEYOND THIS CASE	8
III. THE NINTH CIRCUIT DECISION IS CORRECT	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Arizona Public Service Co. v. Aspaas, 77 F.3d 1128 (9th Cir. 1995) 6, 7

Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F.2d 1047 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9, 106 S. Ct. 289 (1985) 10

Citizen Potawatomi Nation v. Norton, 248 F.3d 993 (10th Cir.), *modified*, 257 F.3d 1158 (10th Cir. 2001) 6

Clinton v. Babbitt, 180 F.3d 1081 (9th Cir. 1999) 6

Dawavendewa v. Salt River Project Agricultural Improvement and Power District, 154 F.3d 1117 (9th Cir. 1998), *cert. denied*, 528 U.S. 1098 (2000) 2

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) 11

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 80 S. Ct. 543 (1963) 11

Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542 (2nd Cir.), *cert. denied*, 502 U.S. 818 (1991) 5

Kescoli v. Babbitt, 101 F.3d 1304 (9th Cir. 1996) 6

Keweenaw Bay Indian Community v. State, 11 F.3d 1341 (6th Cir. 1993) 5

Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S. Ct. 1700 (1998) 10

Lumber Industry Pension Fund v. Warm Springs Forest Products Industries, 939 F.2d 683 (9th Cir. 1991) 11

TABLE OF AUTHORITIES – Continued

Page

Manybeads v. United States, 209 F.3d 1164 (9th Cir. 2000), *cert. denied*, 532 U.S. 966 (2001) 6

Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245 (1981) 10

Pembina Treaty Committee v. Lujan, 980 F.2d 543 (8th Cir. 1992) 5

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900 (1984) 7

Pit River Home and Agricultural Cooperative Ass'n v. United States, 30 F.3d 1088 (9th Cir. 1994) 6

United States v. Tribal Development Corp., 100 F.3d 476 (7th Cir. 1996) 5, 9

STATUTES

42 U.S.C. § 2000e-2(a) 2, 8

42 U.S.C. § 2000e-2(i) 2, 8

Rule 19, Fed. R. Civ. P. ..... *passim*

STATEMENT OF THE CASE

A. Essential Facts

Respondent, the Salt River Project Agricultural Improvement and Power District ("SRP"), is a municipal corporation and political subdivision of the State of Arizona. It operates an electric generation facility known as the Navajo Generating Station ("NGS"), which is located on tribal land within the boundaries of the Navajo Indian reservation.

NGS was built pursuant to a lease SRP negotiated with the Navajo Nation in 1969. The lease expressly requires SRP to give employment preferences at NGS to members of the Navajo Nation:

> Lessees agree to give preference in employment to qualified local Navajos, it being understood that "local Navajos" means members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe. . . . In the event sufficient qualified unskilled, semi-skilled and skilled local Navajo labor is not available, or the quality of work of available skilled or semi-skilled workmen is not acceptable to Lessees, Lessees may then employ, in order of preference, first qualified non-local Navajos, and second, non-Navajos.

(Pet. App. at 3, n.2).

Petitioner is a Hopi Indian who resides a few miles away from the Navajo reservation. In 1991, he applied for one of seven Operator Trainee positions at NGS. He ranked ninth out of twenty applicants on a qualifications test. SRP chose not to interview Petitioner for the Operator Trainee positions because he is not affiliated with the Navajo Nation.

B. Proceedings Below.

1. District Court.

Petitioner filed suit against SRP alleging that giving employment preferences to Navajos, as required by SRP's lease with the Navajo Nation, violated the prohibition against national origin discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). SRP filed a motion to dismiss Petitioner's complaint, contending: (1) employment preferences given to Navajos under the lease requirement are made exempt from Title VII's prohibitions by 42 U.S.C. § 2000e-2(i) (exempting certain employment preferences "given to any individual because he is an Indian living on or near a reservation"); and (2) distinctions between Navajo and non-Navajo Indians are political distinctions outside the purview of a national origin claim.

The district court granted SRP's motion to dismiss, but the Ninth Circuit Court of Appeals reversed. *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 154 F.3d 1117 (9th Cir. 1998) ("*Dawavendewa I*"), *cert. denied*, 528 U.S. 1098 (2000). On remand, SRP again moved to dismiss, this time on the ground that the Navajo Nation is an indispensable party under Rule 19, Fed. R. Civ. P.

The district court granted SRP's motion to dismiss. It concluded the Navajo Nation was a "necessary" party under all three tests stated in Rule 19(a):[1] (1) "complete

[1] A person . . . shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action

(Continued on following page)

relief would be impossible for [Petitioner] if the Navajo Nation is not joined," (Pet. App. at 29 (relying on Rule 19(a)(1)); (2) "[t]he Navajo Nation clearly claims an interest [and] . . . [a]bsence from this litigation will 'impair or impede' the Navajo Nation" from protecting its interest, (Pet. App. at 30-31 (relying on Rule 19(a)(2)(i)); and (3) "this litigation threatens SRP with an obligation under Title VII . . . and a conflicting obligation under its lease with the Navajo Nation," (Pet. App. at 31 (relying on Rule 19(a)(2)(ii)).

The district court then concluded the Navajo Nation could not be joined because of its sovereign immunity from suit. (Pet. App. at 32-33). It then determined that the first three factors listed in Rule 19(b)[2] weigh in favor of dismissing Petitioner's suit due to the Navajo Nation's absence. With respect to the fourth factor, the district court suggested Petitioner might be able to "challenge

---

in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

[2] If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

SRP's actions in Navajo Tribal Court," in which the Navajo Nation could be made a party. However, it also held that even if Petitioner had no other adequate remedy, "the Navajo Nation could still be treated as indispensable." (Pet. App. at 35-36).

2. Court of Appeals.

Petitioner appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. Like the district court, the Ninth Circuit held that the Navajo Nation was a "necessary party" under Rule 19(a) because, in the absence of the Navajo Nation, complete relief cannot be accorded to Petitioner, Petitioner's suit might impair or impede the Navajo Nation's ability to protect its obvious interest in its contractual rights under its lease with SRP, and there is a substantial risk that SRP will face inconsistent obligations. (Pet. App. at 8-15).

The Ninth Circuit also agreed that, because the Navajo Nation enjoys sovereign immunity from suit, it cannot be joined to Petitioner's suit. Moreover, it held that Petitioner could not evade the Navajo Nation's sovereign immunity by joining unspecified tribal officials in the Navajo Nation's stead. (Pet. App. at 15-20).

Finally, the Ninth Circuit weighed the required factors in Rule 19(b) and agreed with the district court that "in 'equity and good conscience' this action should not proceed in [the Navajo Nation's] absence." (Pet. App. at 20-24).

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has abandoned any argument that the Navajo Nation is not a necessary party under Rule 19(a). Instead, the focus of his Petition is whether the Navajo Nation enjoys sovereign immunity at all, whether that immunity can be avoided by naming tribal officials as defendants instead of the tribe, and whether "in equity and good conscience the action should proceed" in the absence of the Navajo Nation. The Petition should be denied because: (1) the Ninth Circuit's decision joins a long list of other federal court decisions which uniformly reject Petitioner's arguments; (2) the decision has only limited application beyond this case; and (3) the Ninth Circuit decision is correct.

I. THE NINTH CIRCUIT'S OPINION IS FULLY CONSISTENT WITH THE DECISIONS OF THIS AND OTHER FEDERAL COURTS.

Although Petitioner argues that the Ninth Circuit's decision "conflicts with legal precedent" (*see* Petition at 11), he does not point to a single conflict with this Court's decisions. Nor does he contend that the Ninth Circuit's holding conflicts with the decisions of any other circuit of the Court of Appeals. To the contrary, the other circuits have consistently held that, because an absent Indian tribe enjoys sovereign immunity, the tribe is an indispensable party and dismissed the action. *See, e.g., Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542 (2nd Cir.), *cert. denied*, 502 U.S. 818 (1991); *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341 (6th Cir. 1993); *United States v. Tribal Development Corp.*, 100 F.3d 476 (7th Cir. 1996); *Pembina Treaty Committee v. Lujan*, 980

F.2d 543 (8th Cir. 1992); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993 (10th Cir.), *modified*, 257 F.3d 1158 (10th Cir. 2001).

Furthermore, the Ninth Circuit's decision in this case is consistent with many prior Ninth Circuit decisions in which suits were dismissed because tribal sovereign immunity prevented the joinder of an absent Indian tribe – even when dismissal admittedly left the plaintiffs without any adequate remedy. *See, e.g., Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000), *cert. denied*, 532 U.S. 966 (2001); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *Pit River Home and Agricultural Cooperative Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994).

Petitioner nevertheless asserts that the Ninth Circuit's decision conflicts with its prior ruling in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995). However, there is, in fact, no conflict at all. In *Aspaas*, the Office of Navajo Labor Relations initiated administrative proceedings challenging the application of APS's anti-nepotism policy to Navajo employees at the power plant operated by APS on the Navajo reservation. After the administrative agency ruled against it, APS appealed to the Navajo Supreme Court. That court affirmed the ruling against APS, and APS filed suit in federal district court against the tribe, various tribal agencies and tribal officials, seeking declaratory and injunctive relief. The district court dismissed APS' claims against the Navajo Nation and its agencies based on sovereign immunity, but allowed APS to proceed with its claim that the tribal officials violated federal law by acting beyond the scope of their authority. The Ninth Circuit affirmed.

Aspaas is inapplicable for several reasons. First, Petitioner has never asserted in this case a claim that any tribal official has violated federal law by acting beyond the scope of his or her authority. Indeed, Petitioner has not alleged any conduct of any kind by tribal officials. Furthermore, he has neither named any tribal officials as parties to this action, nor filed a motion to amend his complaint for that purpose.

More importantly, whether the Navajo Nation was an indispensable party under Rule 19 was not an issue in *Aspaas*. Thus, *Aspaas* does not support the proposition for which Petitioner cites it: if the Navajo Nation cannot be joined because of its sovereign immunity, Petitioner's suit should nevertheless proceed with individual tribal officials standing in the Navajo Nation's place. To the contrary, this Court has held:

> The general rule is that relief sought nominally against an officer is in fact against the sovereign **if the decree would operate against the latter.** And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101-02, 104 S. Ct. 900, 908-09 (1984) (emphasis added). Thus, if a suit against tribal officials would result in a judgment binding on the tribe, it too is barred by sovereign immunity. On the other hand, if a suit against tribal officials does not bind the tribe, the suit may not be barred, but it does not solve Petitioner's indispensable party problem precisely because it does not bind the tribe.

Accordingly, because the Ninth Circuit's decision is consistent with a well-established body of cases throughout the federal courts, this Court should deny the Petition for Writ of Certiorari.

II. THE NINTH CIRCUIT'S DECISION HAS ONLY LIMITED APPLICATION BEYOND THIS CASE.

The Petition should also be denied because the Ninth Circuit's decision has only limited application beyond this case. Petitioner's arguments to the contrary are unfounded.

Petitioner substantially overstates when he claims that, as a result of the Ninth Circuit decision, "Title VII will no longer apply on Tribal lands." (Petition at 6). This doomsday prediction is unsupported by any evidence or logic. Central to the determination in this case that the Navajo Nation is an indispensable party was the lease provision requiring SRP to give employment preferences to Navajos. Not every tribe mandates employment preferences through lease provisions (or tribal ordinances), and many that do require only "Indian preference" – which Title VII expressly allows (42 U.S.C. § 2000e-2(i)) – and do not involve preferences based on tribal affiliation.

Moreover, Petitioner's dire prediction also ignores the broad scope of Title VII. Beyond tribal-affiliation preferences, Title VII prohibits discrimination based on race, color, religion and sex. 42 U.S.C. § 2000e-2(a). Petitioner offers no evidence that any tribe mandates such discrimination through their leases or ordinances, nor is there any suggestion that any tribe claims an interest in doing so. Accordingly, tribes will not be necessary parties (let alone

indispensable) in these kinds of Title VII suits that might arise on their reservation.

Finally, contrary to Petitioner's claims, the Ninth Circuit's decision does not necessarily make Title VII inapplicable to other cases of tribal-affiliation preferences on the Navajo or other reservations. As the Seventh Circuit correctly noted, "Rule 19, which refers a court to its sense of 'equity and good conscience,' mandates a case-specific inquiry." *United States v. Tribal Development Corp.*, 100 F.3d 476, 481 (7th Cir. 1996). In *Tribal Development Corp.*, the court upheld the conclusion that the Menominee Indian Tribe was an indispensable party to a *qui tam* action challenging the legality of certain agreements to sell or lease gambling equipment to the tribe. Because of Rule 19's case-specific inquiry, the court rejected the plaintiffs' argument that concluding the tribe is an indispensable party in one case would "effectively nullify the *qui tam* provisions." It stated:

> Our decision in this case does not eliminate the possibility that in a *qui tam* action involving different circumstances, a sovereign tribe might not be indispensable under Rule 19.

Id. For these same reasons, Petitioner's hyperbolic claim of the total demise of Title VII on Indian reservations is unpersuasive.

III. THE NINTH CIRCUIT DECISION IS CORRECT.

Finally, the Petition for review should be denied because the Ninth Circuit's decision is correct. Petitioner erroneously argues the Navajo Nation cannot claim sovereign immunity in this case because neither Petitioner

nor SRP are members of the Navajo Nation. (Petition at 14). Petitioner's argument confuses two very distinct concepts: tribal sovereign authority and tribal sovereign immunity. A tribe's sovereign authority relates to the tribe's right to exercise authority over others. By contrast, a tribe's sovereign immunity addresses its ability to avoid suit in the courts of other sovereigns.

Tribal sovereign authority generally does not extend beyond the boundaries of the reservation or to nonmembers of the tribe. *See Montana v. United States*, 450 U.S. 544, 565, 101 S. Ct. 1245, 1258 (1981). By contrast, tribal sovereign immunity does not depend on whether the challenged activity occurs on or off the reservation or whether the parties to the suit are nonmembers of the tribe. *See Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760, 118 S. Ct. 1700, 1705 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1052 n.6 (9th Cir.) ("[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation."), *rev'd in part on other grounds*, 474 U.S. 9, 106 S. Ct. 289 (1985). The Ninth Circuit recognized Petitioner's mistaken effort to jumble these two distinct concepts and properly rejected it. (Pet. App. at 20 ("Dawavendewa appears to confuse the fundamental principles of tribal sovereign authority and tribal sovereign immunity.")).

Petitioner also erroneously asserts that, because Title VII is a law of general application, it must apply on the Navajo Nation's reservation, irrespective of treaty or other

rights. (Petition at 9-10 (citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S. Ct. 543 (1963); *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F.2d 683 (9th Cir. 1991); and *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)). However, as the Ninth Circuit correctly pointed out, the very cases on which Petitioner relies "also outline specific exceptions to the general rule – situations in which statutes of general applicability do not apply to Native Americans on tribal lands. In appropriate situations, federal law yields out of respect for treaty rights or the federal policy fostering tribal self-governance." (Pet. App. at 14 (citations omitted)). Because the Ninth Circuit employed the correct analysis and reached the correct conclusion, review of the Ninth Circuit decision is not warranted.

CONCLUSION

For the reasons discussed above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

JANE D. ALFANO
Corporate Counsel
ROBERT T. ANDERSON
Senior Attorney
Salt River Project
P.O. Box 52025
Phoenix, Arizona
85072-2025
(602) 236-2359

JOHN JAMES EGBERT
Counsel of Record
JENNINGS, STROUSS &
SALMON, P.L.C.
Two North Central Avenue
16th Floor
Phoenix, Arizona 85004
(602) 262-5994
Attorneys for Respondent